

ESPLÁSTICOS COMMENTS TO THE ROYAL DECREE ON PACKAGING AND PACKAGING WASTE

TRIS PROCEDURE

EsPlásticos is the platform that brings together the different agents that are part of the sector and the value chain of plastics in Spain.

EsPlásticos supports the need for a climate neutral and circular economy. We also understand that it will be challenging to achieve the goals being set in legislation, as well as those we are setting ourselves. We are convinced that an essential tool to drive the transformation that is needed to achieve the EU's vision of a circular economy will be the power of the EU's internal market. It is vital that an EU harmonized approach is taken to the types of measures set out in this notification, so that all relevant stakeholders and Member States are driving towards the same sets of criteria and goals.

We therefore call on the Commission to protect the EU Single Market and to create the conditions that will enable forthcoming harmonized measures to unleash change to achieve their intended objectives.

1. Object of the TRIS contribution

On 06 May 2022, Spain notified to the European Commission a [Draft Royal Decree](#) on Packaging and Packaging Waste (hereafter "the Royal Decree"). The Royal Decree sets out packaging reduction objectives, as well as obligations for packaging reuse, recycling of packaging waste and marking requirements. It also reviews the Extended Producers Responsibility (EPR) scheme for household packaging.

Also, it should be noted that the European Commission is about to adopt a legislative proposal that will amend the existing Packaging Directive, either in the form of a Directive or a Regulation. Accordingly, the evaluation of certain technical regulations and targets contained in the DRDP should be assessed, *de lege ferenda*, in light of the approaching new European measures, in accordance with article 288 of the TFEU.

The following draft measures are the object of this contribution.

1. Article 6 (2) - achieve a 20% reduction in the number of single-use plastic beverage bottles placed on the market by 2030.

Directive 2019/904 on Single-Use Plastics (SUP Directive) clearly states that only single-use plastic products listed in Part A of its Annex are subject to a sustained reduction in consumption. **The Spanish requirement, therefore, over-transposes the SUP Directive**, since the adoption of consumption reduction measures exclusively applies to single-use plastic beverage cups and food containers destined for on-the-go consumption. Such measure also runs counter the objective of the SUPD which aims to drive the uptake of recycled content and increase the separate collection of single-use plastic beverage bottles, whereby promoting the circularity of these packaging solutions. Likewise, it also runs against articles 11 (3) and (4) of this Royal Decree, that introduce mandatory recycled plastic content for plastic bottles and packaging made of polyethylene terephthalate (PET).

In addition to deviating from provisions set out in the SUPD, **the requirement is formulated in very vague terms**. The text mentions that this reduction objective could be achieved by “measures set out in this Royal Decree *and others that may be adopted*”. Such formulation undermines the legal certainty of economic operators, who will bear the costs of complying with a requirement that will be enforced in Spain only.

Furthermore, it involves discrimination because of the packaging material and product, without providing evidence, nor technical, scientific or statistical data that justifies it. On the contrary, there is ample scientific evidence of the fact that PET has the best results in terms of carbon footprint compared to the beverage packaging alternatives available, and the impact of this packaging waste on the environment will be already reduced to the minimum due to SUPD separate collection objectives.

Finally, **the measure could create unjustified barriers to the trade of goods between Member States** which are not justified by the attainment of the SUP Directive environmental objectives, thus not uphold by the *lex specialis* principle set in article 4 of the SUP Directive, nor compliant with article 18 of the PPWD. The latter obliges Member States to allow the placing on the market of their territory of packaging which satisfies the provisions of the Directive.

2. Article 7 (4) (a) and (b) - ban on packaging for fruit and vegetables in retail stores. This ban would not apply to batches of more than 1.5 kg or to fruits and vegetables at risk of deterioration when sold in bulk. The latter will be determined by the Spanish Agency for Food Safety and Nutrition, in coordination with the Ministry of Agriculture, Fisheries and Food.

From EsPlásticos, we support the fact that this measure is now applied to all kind of materials in order to make a responsible use of packaging to present whole fresh fruits and vegetables. Moreover, we support the fact that, in order to prevent food waste, a list will be drawn up by Spanish Agency for Food Safety and Nutrition coordinated with the Ministry of Agriculture, within 3 months from the approval of the RD, and once it is published, businesses have 4 months to adapt it.

However, the proposed measure clearly infringes article 18 of the PPWD which provides that Member States “shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive”. Since the proposed ban will effectively impede the marketing of packaged goods in Spain that are fully compliant with the PPWD, this requirement violates article 18. In relation to this, we agree with the reasoned opinion that Spain submitted when France notified its Draft Decree on the obligation to display for sale fresh, unprocessed fruit and vegetables without packaging composed entirely or partly of plastic.

In this sense, we would prefer that this approach, that aims to have a more responsible use of packaging in fruits and vegetables, is agreed at EU level in order to maintain the internal markets and we encourage the European Commission to take this proposal into account in the revision of the new PPWD.

3. Articles 8 and 9 (4) - reuse targets and measures.

Article 8 proposes the introduction of ambitious reuse targets for beverage containers in the HORECA sector¹, beverage containers marketed in the retail sector², as well as reuse targets for other packaging applications (reusable packaging marketed in the retail, industrial and commercial sectors)³, to be achieved at national level.

It is difficult to establish objectives without knowing the state, the current percentage of reuse in each sector. The fulfillment of this objective may be impossible individually for each sector. In addition, it is necessary to make an evaluation of what proportion of packaging is likely to be reusable and through an LCA to be able to assess whether there is an environmental benefit. In addition, reaching a first objective in less than 4 years leaves no room for preparation for all the sectors involved, that is, there will not be reusable packaging available for all industry and commerce in Spain. In the case of plastic packaging, there may be containers such as bottles, pallets or containers that can be reusable, but time is needed to develop regulations and to carry out the eco-design that guarantees reuse.

On the other hand, Royal Decree 888/1988 prohibits the use of reusable packaging for some materials used for perishable products and specifics sectorial legislation that bans reusable packaging for hazardous products. In addition, today there are no harmonized standards that define what is a reusable commercial or industrial container.

We would like to recall that, at the time of this submission, the European Commission has announced its intention to set reuse targets at EU level as part of the PPWD revision. Therefore, **the establishment of unilateral national reuse targets risks undermining the upcoming revision of the PPWD**, which is looking at ways to boost reuse through harmonized measures at EU level. In line with the principle of sincere cooperation, Spain should refrain from adopting regulations to address an issue which can only be adequately addressed at EU level and in a field which the EU intends to harmonize. This is the case for the deployment of reusable packaging systems.

In addition to this, the proposed targets may have the effect to restrict the free movement of products and discriminate against foreign manufacturers. In the absence of an EU legal framework, national regulation on mandatory reusable packaging infringes the EU principle of the free movement of goods. Even though the setting of reuse objectives would be in accordance with article 5 of the PPWD, the same article also establishes that the above measures must be adopted "in conformity with the Treaty", which implies that they must be proportionate to the purpose pursued and that in no case imply an infringement.

Finally, mandatory reuse targets affect more strongly foreign than domestic manufacturers. **Producers exporting products to Spain would need to create an entire new logistic chain to be able to comply with the reuse targets established in the Royal Decree**, which puts

¹ The following targets are set for beverage containers in the HORECA sector (in sales units or equivalent units): 1. Bottled water: reuse of 30% by 2025 and 50% by 2030; 2. Beer: reuse of 80% in 2025 and 90% in 2030; 3. Soft drinks: reuse of 70% in 2025 and 80% in 2030; 4. Others: reuse of 25% in 2025 and 30% in 2030.

² The following targets are set for beverage containers marketed in the domestic channel (in sales units or equivalent unit): a minimum of 10% by 2030.

³ The proportion of reusable containers marketed in the domestic channel with respect to the total of containers by weight of this category should be 5% in 2030 and 10% in 2035. The proportion of commercial packaging and reusable industrial packaging, with respect to the total of packaging by weight for each of these categories, should be 20% in 2030 and 30% in 2035.

them at a competitive disadvantage compared with locally established producers (not exporting outside of Spain) for whom it will be easier to comply. Reuse requirements should therefore be introduced in a harmonized way at EU level.

Finally, it should be noted that the forthcoming revision of the Packaging Directive will seek to promote reuse through standardized measures in the EU, which may result in an approach that is contradictory to the measures proposed in the Draft Decree for the Spanish market.

ALTERNATIVE PROPOSAL: Aspirational targets until EU targets are established based on real data available. This proposal is based in the challenges that these proposed targets, which are considered excessively demanding. The establishment of ambitious targets, to be achieved in such a short period, would have a very important economic impact for all the sectors, since it would require a change in the business model of the companies. This could compromise their competitiveness and even have a disincentive effect for companies that invest in reuse.

4. Articles 11 (3) and (4) - mandatory plastic recycled content

The Spanish Decree introduces the following minimum recycled plastic content targets:

- In 2025, 25% of rPET, calculated as an average of all the PET packaging placed on the market.
- By 2025, plastic packaging not subject to the obligation in point (a) must contain at least 20% recycled plastic, calculated as the average of all such packaging placed on the market.
- By 2030, at least 30% recycled plastic, calculated as the average of all plastic packaging placed on the market.

Additionally, the above provisions demand these targets to be fulfilled by every individual producer placing plastic packaging on the market while exempting compostable plastics. It would have thus been necessary to evaluate whether these requirements would be proportionate for the economic operators concerned, with particular emphasis on the impact that compliance could have on small and medium-sized enterprises.

In consideration of the above, EsPlásticos supports mandatory plastic recycled content targets, but as an average of all packaging placed in the market, although we will prefer this kind of measures are agreed at EU level in order to maintain the internal market and we encourage the European Commission to take this proposal into account in the revision of the new PPWD.

5. Article 13. Marking and information requirements.

Paragraph 2 of article 13 introduces the requirement that **household packaging “indicate if it is reusable and the fraction or container in which it is to be deposited”**. In the case of packaging made of different materials, it clarifies that, if they can be easily separated, the fraction or container in which they must be deposited will be indicated. When the materials cannot be easily separated, or in the case of composite packaging, the fraction or container corresponding to the predominant material by weight will be indicated, unless a better collection alternative is provided that would avoid potential problems during the subsequent recycling process.

In addition, paragraph 5 of article 13 stipulates that **packaging that is compostable** in household or industrial composting processes should be marked with the words **"Do not litter"**.

EsPlásticos supports this measure, but we will prefer to be agreed at EU level in order to maintain the internal market and we encourage the European Commission to take this proposal into account in the revision of the new PPWD.

6. Article 34. Financing of waste management operations for household packaging waste.

The Draft Decree introduces new EPR costs associated with separate collection targets for packaging waste. These targets have been set for all packaging – **global targets, applicable to all materials**, and **material-specific targets** (plastics, paper, beverage cartons, metals, glass and wood).

Art. 34 stipulates that, depending on the **regional compliance** with these targets, specific costs will have to be covered for packaging waste recovered from, among others, residual waste and the cleaning of public roads, green areas, recreational areas and beaches.

Concretely, article. 34.1.b.1^o states that, **if the separate collection targets at the regional level are met**, for the packaging waste actually recovered, EPR schemes shall **finance 50%** of the costs. Article 34.1.b.2^o requests total costs to be paid for the waste actually recovered in the event of non-compliance.

It should be noted that article 8.4.a of the Waste Framework Directive states that: *“Member States shall take the necessary measures to ensure that the financial contributions paid by the producer of the product to comply with its extended producer responsibility obligations: (a) cover the following costs for the products that the producer puts on the market in the Member State concerned: — costs of separate collection of waste and its subsequent transport and **treatment, including treatment necessary to meet the Union waste management targets, and costs necessary to meet other targets and objectives as referred to in point (b) of paragraph 1, taking into account the revenues from re-use, from sales of secondary raw material from its products and from unclaimed deposit fees...**”.*

It can be deduced from the wording of the above article that, in general, **only** the costs **necessary to meet the waste management targets** (e.g. European recycling targets) and the **costs necessary to meet other targets and objectives that may be set** (such as, for example, the separate collection targets set by the Draft Regulation) should be borne. EPR systems should therefore cover those costs, but only to the **extent necessary to meet those targets**. Consequently, if the waste management targets (both recycling targets and separate collection targets) are achieved, payments that are **not necessary to ensure said compliance should not be required**.

Art. 8.4.c of the Directive also states that costs to be borne should **not exceed the costs that are necessary to provide waste management services in a cost-efficient way**.

In short, article. **34.1. b.1^o of the Draft Regulation**, requesting EPR schemes to cover for 50% of the costs associated with recovering packaging waste from residual waste and clean-up operations, expands EPR costs in a disproportionate manner and without justification, breaching both the necessary cost and efficiency principles stipulated in article 8.a of the Waste Framework Directive.

ANNEX I. INFRINGEMENT OF EU LEGISLATION, TFEU PROVISIONS ON SINGLE MARKET AND TEU PROVISIONS

The above-mentioned measures infringe the following EU legislation and TFEU provisions:

1. **Article 18 of the Packaging and Packaging Waste Directive (94/62/EC)**, which provides that, even if Member States are allowed to go beyond the requirements laid down in its provisions, they “shall not impede the placing on the market of their territory of packaging which satisfies the provisions of this Directive”. All the measures analysed as part of this contribution will effectively impede the marketing of packaged goods in Spain that are fully compliant with the PPWD and are therefore in violation of the article 18. It is also noteworthy that the legal basis of the PPWD is article 114 of the TFEU. This further limit the discretion of Spain vis-à-vis imposing additional requirements on packaging in contradiction to article 18 of the PPWD.
2. **Article 8a(1)(d) of the Waste Framework Directive (2008/98/EC)**, which prevents Member States from “placing a disproportionate regulatory burden on producers” and article 8(3) of the Waste Framework Directive, which provides that when applying Extended Producer Responsibility (EPR) Schemes, Member States must respect “the need to ensure the proper functioning of the internal market”.
3. **Article 34 TFEU**, which prohibits “quantitative restrictions on imports and all measures having equivalent effect between Member States”. Quantitative restrictions can only be justified by one of the public interest grounds set out in article 36 TFEU or by one of the overriding and mandatory requirements developed by case-law in the EU Court of Justice. Such rules must be necessary in order to attain legitimate objectives and be in conformity with the principle of proportionality, which requires that the least restrictive measure be used. The proportionality of measures mandated by the Royal Decree can be questioned. As mentioned above, Spain has failed to provide adequate justification on the need and proportionality of the proposed measures. Even if the intended objective to prevent and reduce the impact of packaging and packaging waste on the environment would be considered legitimate, the measures are not proportionate as this objective can be achieved by less restrictive measures and better addressed by an EU-wide approach, which the Royal Decree currently undermines.
4. **Article 4(3) TEU**: In line with the principle of sincere cooperation, a Member State should refrain from adopting legislation to address an issue which can only be adequately resolved at EU level and in a field which the EU intends to harmonise. This is the case for the packaging legislation. Spain should not pre-empt the setting of harmonised rules at EU level, such as provisions relating to recyclability, reuse, recycled content and labelling. These matters should be dealt with at the EU level as part of the ongoing revision of the Packaging and Packaging Waste Directive.